In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1490

HOWARD MANUFACTURING COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

The issue raised by the petition is whether the Board may properly disregard the effect of post-election employee turnover in determining whether an employer's pre-election unfair labor practices preclude the holding of a fair representation election and warrant a bargaining order. Since petitioner did not raise that issue before the Board, however, judicial review thereof is precluded by Section 10(e) of the National Labor Relations Act (29 U.S.C. 160(e)).[1] See *Marshall Field*

[1] Indeed, petitioner did not even raise the issue in the court of appeals until after the latter had rendered its decision sustaining the Board (see Pet. App. A16-A20).

and Co. v. *National Labor Relations Board,* 318 U.S. 253, 255; *National Labor Relations Board* v. *Seven-Up Bottling Co.,* 344 U.S. 344, 350.

In any event, the Board believes that the court of appeals correctly decided this case. See *National Labor Relations Board* v. *Gissel Packing Co.,* 395 U.S. 575, 610-611. The basic question presented in this case is the same as that involved in the conflicting decisions among panels of the Fifth and Sixth Circuits which this Court has been asked to review this Term. See, *e.g.,* the Board's petitions in *National Labor Relations Board* v. *Clark's Gamble Corporation,* No. 265, this Term, certiorari denied, 400 U.S. 868, and *National Labor Relations Board* v. *American Cable Systems, Inc.,* No. 737, this Term, certiorari denied, 400 U.S. 957,[2] and the company petitions in *American Art Industries, Inc.* v. *National Labor Relations Board,* No. 995, this Term, certiorari denied, February 22, 1971, and *G.P.D., Inc.* v. *National Labor Relations Board,* No. 1169, this Term, certiorari denied, March 22, 1971. While the Board agrees with petitioner that this conflict in decisions should be resolved by this Court, presumably the same considerations which led the Court to deny the previous petitions would also lead it to deny this petition, even if the issue had been properly raised below.

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[2] In *American Cable,* in addition to employee turnover between the unfair labor practice and the Board's bargaining order, there was also the fact that the management official who had committed the unfair labor practices had subsequently left the company.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
National Labor Relations Board.

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